
IN THE
Supreme Court of the United States

October Term, 1979

No. 79-280

WESTERN ELECTRIC COMPANY, INCORPORATED,

Petitioner,

—v.—

HONORABLE HERBERT J. STERN, UNITED STATES DISTRICT
JUDGE FOR THE DISTRICT OF NEW JERSEY,

Nominal Respondent,

KYRIAKI CLEO KYRIAZI, individually and on behalf of all
those similarly situated,

Respondent.

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI
AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, AND PETITION
FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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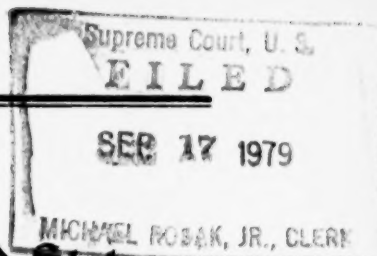


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Statement of the Case

Introduction

This Title VII class action is now in its ninth year measured from the filing of charges with the state and federal administrative agencies in 1971 and 1972 and in its seventh

year in the federal courts. Although on October 30, 1978 the District Court found that Petitioner, Western Electric Co., Inc. (Western) had engaged in a widespread pattern and practice of unlawful employment discrimination against the plaintiff and other females at its Kearney, New Jersey plant (Opinion and Order, pp. 30a-169a),¹ Respondent, Kyriaki Cleo Kyriazi (plaintiff) and the class she represents are still being delayed in achieving relief to which they are entitled as a result of Western's proven wrongs.²

The District Court is now proceeding with Stage II of the bifurcated trial to determine the remedy for individual members of the class (e.g., Opinion and Order of Reference, pp. 170a-204a). Western's petition seeks review of the denial by the Third Circuit Court of Appeals of its petition for writ of mandamus seeking a stay of Stage II proceedings and a stay of the interim attorneys' fees award pending appellate review of certain interim District Court Orders.

This attempt to gain appellate intervention to further obstruct the trial is consistent with Western's litigation strategy since the inception of this action: to forestall its conclusion by waging a war of attrition. The commencement of trial was delayed for more than four years after the filing of the complaint by Western's recalcitrance in discovery; by Western withholding and then altering documents sought in discovery causing a collateral proceeding

¹ References to Western's Appendix are described by the page number and the letter "a".

² This is not a case where petitioner can even hope to question the sufficiency of the evidence of wrongdoing. It had admitted on trial the use until mid-1976 of procedures that permitted supervisors to select persons for job openings by sex, which it knew to be unlawful (pp. 78a-83a). Almost all other proof of its unlawful conduct came from its own records and from its management employees whose testimony was not impeached by Western.

at which its witnesses admitted perjury (pp. 66a-83a); by Western petitioning twice to the Third Circuit Court of Appeals for writs of mandamus during the Stage I proceedings; by Western seeking on the first day of trial an indefinite adjournment on the most transparently contrived grounds, and failing that, attempting to abort the entire trial after its second day by making a frivolous motion for the recusal of the trial judge.

Having succeeded in delaying the speedy completion of Stage I, Western has embarked on a similar strategy with respect to the Stage II proceedings concerning assessment of damages by its petition to the Third Circuit Court of Appeals for a writ of mandamus, the denial of which is the basis for Western's petition to this Court. The petition raises three issues which essentially challenge the District Court's management of the trial: the bifurcation order; the failure of the District Judge to issue an injunction immediately after the Stage I findings; and the order granting interim attorneys' fees for Stage I.

Statement of Facts

Since Western's statement of facts is selective and argumentative, plaintiff has provided this Court with the following outline of those aspects of the proceedings below which are relevant to Western's contentions.

On the day that the Court issued its Opinion, Order and Judgment finding liability for the class and for plaintiff Kyriazi, and directing the payment of reasonable attorneys' fees, it began preparations for Stage II of the trial to determine damages for the individual class members.

Although plaintiff proposed that formulae be developed providing remedy to the class members on the basis of

computations made from personnel records, the District Court adopted Western's contention that it was entitled to have each class member's claim determined on an individual basis, with full hearing, and with preliminary discovery as to each claimant, the very procedure which Western now claims is burdensome and entitles it to interlocutory review (pp. 170a-204a).

On November 9, 1978, at a status conference, Western proposed that Stage II procedures be delayed to permit an appeal to the Circuit Court. The District Judge, however, viewed the Opinion, Order and Judgment of October 1978 determining liability as fact-finding and not as embracing any conclusions of law properly certifiable for appeal. Western did not request a stay from the District Judge to permit it to seek a writ of mandamus; in fact, the petition for writ of mandamus to the Court of Appeals was not filed until March 27, 1979, more than four months later (p. 4a).

In the interim, implementation of Stage II had begun. The District Judge appointed Special Masters (p. 205a); notices to members of the class were mailed and published in various newspapers.³ Guidelines for the Masters were litigated and issued by the District Court (pp. 170a-204a). Individual hearings have been started, depositions have been conducted and interrogatories served.

On January 22, 1978, plaintiff submitted an application for interim fees in accordance with the District Court's Judgment and Order directing payment of interim counsel fees upon filing of appropriate affidavits (pp. 168a-169a). At a status conference held on February 22, 1979, the District Judge sought from Western an agreement on an

³ More than 1500 class members, not including rejected applicants, filed notice of claim forms with the Court.

amount of fees which plaintiff could reasonably claim without dispute; Western refused to name any amount.⁴

Thereafter, on February 27, 1979, the District Judge awarded as a temporary interim fee, one-half of the total base amount of the fees and costs requested by plaintiff's counsel for Stage I in her January 22, 1979 application (pp. 211a-212a).⁵ On March 9, 1979, the District Judge entered an Order to that effect (pp. 213a-214a).⁶ Without requesting a stay from the District Judge of his Order to pay interim fees, Western delivered to plaintiff the total amount of the interim award.

On March 27, 1979, Western petitioned the Third Circuit Court of Appeals for a writ of mandamus and prohibition directing the District Judge to vacate the temporary interim award of fees and costs and to stay the Stage II proceedings. Western, in that petition, attacked the alleged "abrogation" of the District Judge's October 14, 1975 bifurcation order and challenged the District Judge's power to award interim attorneys' fees (pp. 5a-18a). By way of motion to the Circuit Court, Western sought a stay of the

⁴ Western's counsel reported at the February 27, 1979 status conference that, without including the time of corporate counsel or other Western employees who assisted in the trial, Western paid more than \$500,000 in attorneys' fees based on almost 11,000 hours for the same period for which plaintiff in her application requested \$442,105 in attorneys' fees for 7,880 hours and \$119,563.90 in costs and disbursements.

⁵ The amount of fees and costs requested refers to dollar computations based on actual hours worked and amount of disbursements, without any multiple which plaintiff sought in her fee application pursuant to *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 486 F.2d 161 (3rd Cir. 1973).

⁶ The Court had previously, on February 27, 1979, also ordered that Western pay plaintiff quarterly for Stage II work (pp. 211a-212a). That portion of the Order was stayed by the District Judge in his March 9, 1979 Order (pp. 213a-214a). At present, the stay remains in effect.

fees and costs award pending determination of the petition. On that day, Western also filed a notice of appeal from that part of the District Judge's Order awarding interim fees.

Although the Circuit Court initially granted Western's motion for a stay of fees and costs, and denied the motion to stay Stage II by Order dated April 25, 1979, it subsequently vacated the stay with respect to interim counsel fees, and denied Western's petition (pp. 1a-2a). Western's petition for rehearing was denied by Order dated May 18, 1979 (p. 3a).

The District Judge has been moving expeditiously on the other aspects of relief arising from Stage I. At a status conference on March 23, 1979, the Court requested that a date be set for the determination of relief to Kyriazi; Western's counsel suggested the end of April or beginning of May and, on July 2, 1979, the District Judge issued proposed findings of fact and conclusions of law with respect to relief for Kyriazi.

At the status conference held on July 16, 1979, the District Judge stated that a final order on the plaintiff's individual case, including injunctive relief, and an award of attorneys' fees would be issued promptly after Western completed the discovery it requested of plaintiff's attorneys' billing procedures.⁷

⁷ Based on detailed affidavits, plaintiff's application for attorneys' fees requested less than the amount Western actually expended on outside counsel alone, see fn. 4, *supra*. Nevertheless, Western insisted that before the District Judge could rule on plaintiff's attorneys' fees application it was entitled to discovery of the billing practices of plaintiff's counsel. It initially sought to examine all bills and time records from 1973 through 1978; the examination was limited to two months of each year, selected at random by Western.

Reasons for Denying the Writ

1.

Western's Petition Does Not Raise Undecided or Controversial Issues of Law, Rather, It Asks This Court to Supervise the District Court's Exercise of Its Discretionary Power to Manage a Complex and Lengthy Trial.

Western's petition does not present issues warranting the exercise of this Court's certiorari jurisdiction. The Circuit Courts are not in conflict as to any issue of law raised by the petition; nor are the orders of the District Court or the decision of the Court of Appeals at variance with any decision of this Court. Despite Western's persistent misreading of *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), that decision authorizes the grant of interim attorneys' fees. *Id.* at 722 fn.28. Moreover, this Court has held that a writ of mandamus is not an appropriate vehicle for review of an award of interim attorneys' fees. *Ex Parte Fahey*, 332 U.S. 258 (1947). Rather than raising legal issues whose resolution would be of general precedential value, Western's petition is essentially an assault on the District Judge's management of the trial proceedings.

Western challenges the terms of the bifurcation order, the District Court's failure to enter a final order for Stage I, and the timing of the award of attorneys' fees. The issue before this Court on certiorari would be whether the Court of Appeals properly denied Western's petition for a writ of mandamus. Such a writ is a drastic remedy and may be issued only when the petition has established the denial of a "clear and indisputable right"; mere error or the inconvenience and cost of further proceedings is not sufficient to justify its issuance. See *Schlagenhauf v. Holder*, 379 U.S.

104, 110-112 (1964); *Banker's Life & Casualty Co. v. Holland*, 346 U.S. 379, 382-385 (1953).

Not only has Western failed to show a clear and indisputable right which would have entitled it to the issuance of a writ of mandamus in the first instance, its petition does not demonstrate that the District Court was in error. Its conclusory constitutional claims are equally barren of support.⁸ The petition contains no citation to any rule of civil procedure or statute which has been violated or to any case which supports its contention that the District Court exceeded its authority.

All of the challenged orders are within the scope of the District Court's discretionary authority. Rule 42(b), Fed.

⁸ Western's constitutional claims are specious. The District Judge's orders providing for an interim award of attorneys' fees and costs based on the Stage I liability finding and directing Western to underwrite part of the Stage II costs, such as the Master's fees, are consistent with the decisions of this Court and Title VII. The structure of Title VII imposes upon private litigants the role of a private attorney general seeking to redress individual wrongs and vindicate the important Congressional policy against discriminatory employment practices. *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 45 (1974). Plaintiff undertook this burden and succeeded by establishing the right of class members to a legal remedy. At the conclusion of Stage I, "the finding of a pattern or practice changed the position of the employer to that of a proven wrongdoer." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 359 fn. 45 (1977). Based upon such a finding, it is fitting that the wrongdoer assume the ongoing expense of prosecuting the damages stage of this lawsuit. Both this Court and Congress have recognized that the burden of financing civil rights litigation may shift from plaintiff to the defendant once substantial rights of the parties have been fixed by an order of the District Court. *Bradley v. Richmond School Board*, 416 U.S. 696, 722, fn. 28 (1974) (reviewing the propriety of an award of attorneys' fees under § 718 of the Emergency School Aid Act, 20 U.S.C. § 1617); see also S. Rep. No. 94-1011, 96 Cong. 2d Sess. 5; H. Rep. No. 94-1558, 94 Cong., 2d Sess. 8 (legislative history concerning the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988).

R. Civ. P., permits the bifurcation of the trial proceedings; Rule 54, Fed. R. Civ. P., delegates to the District Court broad discretion to enter judgments when other causes of action are outstanding; Title VII commits to the District Court discretion to award attorneys' fees, including, as interpreted by this Court, interim fees. 42 U.S.C. § 2000e-5(k). The exercise of such discretionary authority is accorded great deference by the appellate courts, especially when the trial proceedings are complex and lengthy, as in this case with the trial itself consuming 49 trial days. Review involves weighing the idiosyncratic facts which form the basis for the District Court's discretionary judgments, and permits the trial court's judgment to be overruled only when there is a clear abuse of discretion.

Particularly when the Third Circuit Court of Appeals has already exercised its discretion not to interfere with the trial proceedings, Western's contentions do not warrant review on certiorari; either as raising issues of general importance or as presenting a situation in which the District Court has "so far departed from the accepted and usual course of judicial proceedings, . . . , as to call for the exercise of this court's power of supervision." Rule 19(1)(b), Rules of the U.S. Supreme Court.

Moreover, as an extraordinary remedy, mandamus is subject to equitable considerations. See *United States Ex Rel. Turner*, 222 U.S. 204, 209 (1911). Western fares no better when its equitable status is scrutinized. On the issue of the denial of due process based on prejudice to Western's trial strategy (Western's Petition, pp. 19-22), relevant is Western's alteration of documents during the discovery process and the admission of perjured testimony by its employees (pp. 66a-83a). With respect to its due process claim based on the Stage II proceedings (Western's Petition, pp. 17-19), it must be emphasized that it was at

Western's insistence that the Court implemented the very Stage II proceedings in the form which it now challenges as unduly burdensome.

Thus, this petition raises no vital or controversial issues, nor does it ask this Court to right an egregious error which would warrant review on certiorari. Rather, it asks this Court to review the conduct of an unfinished trial so as to determine whether the trial judge properly exercised his discretion in managing the lengthy proceedings below.

2.

Western's Petition Is Interlocutory in Nature and Raises Issues Which Will Either Be Rendered Moot by Further Proceedings in the Trial Court or Will Be Subsumed by Final Orders of That Court.

Western's petition, seeking interlocutory review of interim and non-final orders of the District Court, is a paradigm of the piecemeal review that this Court and Congress have sought to avoid. See 28 U.S.C. §§ 1291, 1292; *Kerr v. United States District Court*, 426 U.S. 394, 403 (1976); *United States Alkali Export Ass'n v. United States*, 325 U.S. 196, 202-203 (1945).

First, consideration of this petition would involve the wasteful duplication of appellate resources. The main thrust of Western's petition is that the District Court erred by not issuing an appealable order. The first two prayers for relief essentially request that the District Court be directed to enter such an order, i.e., an injunction (Western's Petition, p. 27). Even its attorneys' fees argument hinges on the District Court's failure to grant relief to plaintiff, since only then, Western contends, is plaintiff

a "prevailing party" entitled to attorneys' fees⁹ (Western's Petition, p. 24).

The entry of an appealable order is imminent, and may occur before this petition is considered.¹⁰ Thus, if review were granted, this Court would be considering whether to direct the District Court to enter an order which it may have already issued.

The inappropriateness of such review on certiorari is even more compellingly demonstrated by Western's argument concerning attorneys' fees. The propriety of the interim award is at this time the subject of an appeal pending before the Third Circuit of Appeals.¹¹ That issue will become moot when the final order on Stage I attorneys' fees is entered, since the interim award will then be merged into the final award and reviewable as such.

Second, as noted above, Western's petition essentially asks this Court to substitute its judgment for that of the trial judge as to how to manage the trial proceedings. Such intrusion into the province of the trial judge traditionally has been reluctantly exercised, is rarely appropriate by way of mandamus, and certainly is not warranted by Western's hollow constitutional claims.

⁹ Contrary to Western's assertion that relief was not granted prior to the award of interim attorneys' fees, the District Court's Opinion and Judgment of October 30, 1978 finally determined plaintiff Kyriazi's entitlement to relief which left open only the precise amount of back pay and level at which she will be reinstated (p. 155a, at fn. 26).

¹⁰ The District Court has scheduled a conference for consideration of final arguments with respect to interim attorneys' fees, and, the precise amount of back pay and other remedy to the named plaintiff. The Court has sought to expedite this matter for the very purpose of providing Western with an opportunity to appeal. (See Transcript of July 16, 1979, pp. 100-101). Only Western's insistence on discovery with respect to plaintiff's attorneys' entire billing procedure in order to contest plaintiff's application for attorneys' fees has delayed the entry of this order.

¹¹ Case No. 79-1564.

Third, Western's petition is transparently part of Western's strategy to defeat the plaintiff not on the merits but by sheer length of litigation and superior finances. As part of this pattern, Western has already sought appellate intervention on four occasions and will continue to seek review of every interim order. This piecemeal review not only wastes the resources of the appellate courts, but is also calculated to impair the ability of plaintiff to vindicate in an expeditious manner both the right of the class members to relief and the public rights which Congress and the courts have delegated to private litigants to enforce. In these circumstances, Justice Frankfurter's admonition concerning piecemeal appellate review as an impediment to justice is applicable:

Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause.

Cobbledick v. United States, 309 U.S. 323, 325 (1940).

The issues presented by this petition are not worthy of review on certiorari, since they will either be rendered moot by the continuation of the trial proceedings or subsumed by subsequent orders of the trial court which will be subject

to review based on a complete record in the normal course of appellate process. This Court should not indulge Western in its persistent effort to subject this proceeding to repeated piecemeal review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

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